Supreme Court, U.S.
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No. 02-1500

In The
Supreme Court of the United States

HAROLD D. EYL, an individual,

Petitioner,

vs.

CIBA-GEIGY CORPORATION, a New York Corporation, and NORTHEAST COOPERATIVE, a Cooperative Association, and THE CITY OF WISNER, a Political Subdivision,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENTS' SUPPLEMENTAL BRIEF

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June 5, 2003

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RESPONDENTS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Respondents Ciba-Geigy Corporation and Northeast Cooperative submit this supplemental brief which responds to the Brief for the United States as Amicus Curiae filed on May 30, 2003 in *American Cyanamid Co. v. Geye*, No. 02-367 (petition for cert. pending).

Based on a March 1999 amicus curiae brief filed on behalf of the United States Environmental Protection Agency in *Etcheverry v. Tri-Ag Services, Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000), the petitioner asserts his petition should be granted because the EPA's view directly conflicts with the near unanimity among lower courts that 7 U.S.C. §136v(b) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") expressly preempts failure-to-warn and other label-related damage claims. That assertion is no longer correct.

In a response filed May 30, 2003 to the Court's invitation in *American Cyanamid Co. v. Geye*, *supra*, the Solicitor General unequivocally repudiated the position that had been advocated by the EPA in *Etcheverry*, stating "[t]hat position no longer represents the view of the United States." U.S. Amicus Curiae Br. at 9.

The Solicitor General "has [now] concluded that [the United States'] position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is incorrect." U.S. Amicus Curiae Br. at 17. More specifically, the amicus brief in *Geye* advises this Court as follows:

> The United States has reexamined the position that it urged in *Etcheverry* in light of the ruling by the California Supreme Court in that case, as

> well as the subsequent ruling of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is incorrect. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a state legislature or a regulation promulgated by a state agency, it applies to requirements in the form of a duty or standard of care in a tort action.

Id. Further, contrary to the illusory split of authority the petitioner attempts to create, the amicus brief in *Geye* recognizes that "[m]ost federal courts of appeals and state courts of last resort have held that Section 136v(b) preempts state-law failure-to-warn actions, reasoning that such actions are predicated on labeling 'requirements' within the meaning of FIFRA." *Id.* n.4.[1]

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[1] In light of the position now taken by the Solicitor General, petitioner's reliance on *Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001) and *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000) to suggest a conflict with the decision below as a reason for granting the petition should lose most, if not all, of its force. *See* Supreme Court Rule 10(b).

CONCLUSION

The amicus brief in Geye, which directly contradicts the position advocated by the petitioner here, provides this Court with another compelling reason to deny review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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